

HOUSE BILL REPORT

HB 1615

As Reported by House Committee On:
Economic Development, Agriculture & Trade

Title: An act relating to managing livestock nutrients.

Brief Description: Managing livestock nutrients.

Sponsors: Representatives Pettigrew, Kristiansen and Linville; by request of Department of Agriculture.

Brief History:

Committee Activity:

Economic Development, Agriculture & Trade: 2/18/05, 3/2/05 [DPS].

Brief Summary of Substitute Bill

- Establishes authority for full administration of the dairy nutrient management program by the Department of Agriculture (WSDA).
- Establishes the components of and full authority to manage a livestock nutrient management program within the WSDA.
- Authorizes the WSDA to become the state authority for National Pollutant Discharge Elimination System permits for animal feeding operations and concentrated animal feeding operations upon delegation of authority by the United States Environmental Protection Agency and relinquishment by the Department of Ecology.
- Specifies requirements and responsibilities for various approvals and certifications, permits, inspections, compliance, enforcement actions, technical and financial assistance.
- Makes a number of technical changes to relevant statutes.

HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT, AGRICULTURE & TRADE

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 23 members: Representatives Linville, Chair; Pettigrew, Vice Chair; Kristiansen, Ranking Minority Member; Skinner, Assistant Ranking Minority Member; Blake, Buri,

Chase, Clibborn, Condotta, Dunn, Grant, Haler, Holmquist, Kenney, Kilmer, Kretz, McCoy, Morrell, Newhouse, Quall, Strow, P. Sullivan and Wallace.

Staff: Meg Van Schoorl (786-7105).

Background:

In 1998, the Legislature enacted the Dairy Nutrient Management Act requiring dairies to develop by July 1, 2002, farm plans to protect water quality. The Department of Ecology (DOE) was given responsibility to regularly inspect dairies, and to develop and issue a Dairy General National Pollutant Discharge Elimination System (NPDES) permit. The Conservation Commission through conservation districts was charged with providing technical assistance and cost-share to dairy farms to develop and implement their nutrient management plans by December 31, 2003.

In February 2003, the United States Environmental Protection Agency (EPA) adopted rules affecting how animal feeding operations (AFOs) and concentrated animal feeding operations (CAFOs) would be regulated for the purposes of controlling water pollution. The rules expanded the type and number of CAFOs required to obtain NPDES permits by December 2006.

In 2003, the Legislature transferred to the Department of Agriculture (WSDA) the Dairy Nutrient Management Program that had been administered since 1998 by the Department of Ecology (DOE). The Legislature intended that there be a fully functioning state program for concentrated animal feeding operations by 2006 and a single program that would apply to all livestock sectors. Broadened beyond dairies, the Livestock Nutrient Management Program (LNMP) was to provide regulatory oversight and guidance to all livestock farms regarding their state and federal responsibilities to protect water quality while maintaining a healthy business climate for the farms. The program was expected to develop resources for financial and technical assistance, conduct periodic inspections and take enforcement action to ensure compliance with state and federal water quality laws.

The LNMP Development and Oversight Committee (DOC) was created to help the WSDA evaluate the new rules and develop a program that would meet EPA's requirements and time frames. Chaired by the WSDA, the DOC included representatives from the DOE, the EPA, a tribal government, an environmental interest organization, a commercial shellfish grower, an egg laying facility, a conservation district association, three dairy producers, two beef cattle producers, a poultry producer, a commercial cattle feed lot, and Washington State University. Since 2003, the WSDA, the DOE, and the DOC have worked to develop the comprehensive LNMP and draft legislation to initiate it. The WSDA and DOE developed a Memorandum of Understanding to clarify their respective and shared responsibilities during this transition period for site inspections, nutrient management plans, dairy and CAFO permit enforcement, and permit administration. Because the DOE has the delegated authority from the EPA to carry out the Clean Water Act in Washington, including the NPDES program for CAFOs, the DOE has retained responsibility for issuing water quality permits and coordinates with the WSDA in taking action on water quality issues for AFOs and CAFOs. Until the delegated

authority is granted to the WSDA, the DOE will continue in that role. Other organizations such as the Natural Resources Conservation Service (NRCS), the state Conservation Commission and conservation districts, and Washington State University (WSU) Extension, are recognized as providing producer education and technical assistance.

The 2003 legislation required the DOC to develop draft legislation including:

- the statutory changes, including a time line, to phase in a program to comply with the minimum requirements of federal and state water quality laws;
- the statutory changes necessitated by the transfer of the Dairy Nutrient Management Act from the DOE to the WSDA;
- continued inspections of dairy operations at least once every two years;
- an outreach and education program; and
- annual reporting to the Legislature on the progress for implementing the program.

Summary of Substitute Bill:

The WSDA is authorized to implement and administer a Livestock Nutrient Management Program including enforcement, compliance, inspection, technical assistance, approval and certification of livestock nutrient management plans, data management, communication and outreach, and coordination with agencies that provide education and technical or financial assistance.

Sections 1 and 2 - Applicability of Chapter and Findings

The Livestock Nutrient Management Program (Program) applies to all segments of the livestock industry. The goals of the Program are to provide guidance to animal feeding operations about their responsibilities under state and federal water quality laws and to implement requirements in a consistent manner that will maintain a healthy and productive livestock industry in Washington. Specific permit requirements created in the chapter are consistent with federal CAFO rules. All dairies must implement nutrient management plans and submit certain reports. The AFOs that are not CAFOs or dairies are not required to have permits or produce farm plans, but they cannot pollute the state's waters and may be inspected by the WSDA.

Sections 3 - 12 - Amendments to the Dairy Nutrient Management Act - RCW 90.64

Definitions

Definitions are added, deleted or changed to reflect: the transfer of authority from the DOE and conservation districts to the WSDA; expanded program applicability to all livestock operations, not only dairies; key terms such as "animal feeding operations," "small, medium and large "concentrated animal feeding operations," "livestock nutrients," "nutrient management plans," "person," "permit," "pollution," and "waters of the state."

Designation as a CAFO through pollutant discharge

Consistent with federal CAFO rules, an AFO cannot be designated as a CAFO unless the WSDA Director (Director) has conducted an on-site inspection and determined that the operation should be regulated under the permit program. AFOs with numbers of animals below those designated for a medium CAFO cannot be designated as a CAFO unless pollutants are discharged into waters of the state through a man-made ditch, flushing system, or other man-made device or originate outside of the facility or in some way come into direct contact with the animals confined within and are determined to be a significant contributor of pollutants. When considering designating an AFO as a CAFO due to discharge of pollution to the waters of the state, the Director shall consider several factors including the effort by the AFO to stop the discharge.

Inspections

The WSDA is authorized to conduct inspections to determine: if an AFO is a CAFO; ensure compliance with state and federal water quality laws and rules; and determine if a CAFO is complying with its permit. The WSDA is required to inspect all CAFOs and dairies at least once every two years. Additional prioritization criteria for inspections include: proximity to shellfish beds, permit status, compliance history, and other relevant factors to be determined by the WSDA. During inspections, all CAFOs must make available those records required by permit. Those AFOs and dairies that are not covered by permit must make available records such as animal inventories to determine regulatory status, compliance, or qualification for special state programs. The WSDA may conduct follow-up inspections to ensure that corrective actions are being carried out.

Livestock Nutrient Management Plan

All CAFOs and dairies are required to develop a livestock nutrient management plan, have it approved by the WSDA and certified by the WSDA and the livestock producer. This eliminates the current role of the Conservation Commission and conservation districts in establishing elements of the plans, approving and certifying them. Livestock producers must develop plans using NRCS practice standards, although equivalent practices and standards may be used if the WSDA determines through a technical review process that they provide the same or better performance protection as NRCS standards.

Minimum elements and time frames for the plans are set out as specified in the federal rule for CAFOs. Requirements and time lines for dairy plans are continued. Any appeals by producers of the WSDA's decisions regarding nutrient management plans, including denial of the use of alternative standards and practices, must be made to the Pollution Control Hearings Board rather than the conservation districts. Producers may no longer request extensions of plan approval and certification timelines due to financial hardships or local permitting delays, but can use existing appeal processes.

Written complaints against livestock producers must be investigated within three working days. A report of findings will be provided to the livestock producer and, on request, to the complainant within 20 days after receiving the written complaint. The report of findings after inspections of either oral or written complaints will be placed in WSDA's administrative records.

The existing Livestock Nutrient Management Grant Account is moved to the agricultural local fund.

Sections 13-18 - New Sections to the Dairy Nutrient Management Act - RCW 90.64

Records

CAFOs must maintain certain records and reports as mandated by federal rule. Dairies that are not CAFOs must maintain certain records and reports as specified by the WSDA.

Education, Technical and Financial Assistance

The WSDA may coordinate with WSU, the Conservation Commission and conservation districts, the DOE, or other agencies and organizations to implement an education program for nutrient management improvement, and may refer producers to these groups for technical or financial assistance.

At the request of a livestock producer, conservation districts may provide technical or financial assistance in developing, revising, or implementing the producer's livestock nutrient management plan, and may verify that the plan elements meet required standards. To the extent practical and that funding allows, the Conservation Commission and conservation districts shall provide technical and financial assistance to producers.

Advisory Committee

A Livestock Nutrient Management Program Advisory Committee is established including representatives of the livestock industry, environmental community, local, state and federal agencies, and others as determined by the WSDA.

Sections 19-36 - New Sections to the Water Pollution Control Act - RCW 90.48

NPDES Permitting

When EPA delegates authority under the federal Clean Water Act to the WSDA and the DOE relinquishes its authority to administer NPDES, AFO, and CAFO permits and other related duties, the WSDA will be the state authority for the NPDES, AFO, and CAFO program. Until that time, the DOE will remain responsible for NPDES permit administration as described in the MOU between the WSDA and the DOE.

The requirements and processes for producers to obtain the NPDES permit once authority has been delegated to the WSDA are described. A livestock operation which meets the definition of a large CAFO may seek a determination from the WSDA that they have no potential to discharge to the waters of the state. The Director will use a process and criteria from federal rule to make the determination within 60 days. If affirmative, the CAFO will not have to apply for permit coverage but is not relieved from liability should an actual discharge occur.

After receiving the delegation of authority from EPA, the WSDA must establish by rule, annual permit administration fees to be used for costs the WSDA incurs for processing permit applications and modifications, monitoring and evaluating compliance, conducting inspections, securing laboratory analysis of samples, reviewing plans and documents, and

supporting directly related overhead expenses. The initial fee schedule will be the same as the DOE's existing schedule, but the fees may increase according to the fiscal growth factor.

Pollutant Discharge, Violations

It is illegal for those regulated under the LNMP to discharge into the waters of the state organic or inorganic matter including livestock nutrients that shall cause or tend to cause pollution of the waters. Duties of CAFOs and dairies in the event of a discharge to waters of the state are specified.

The WSDA has the authority at any reasonable time to enter and conduct inspections of records and facilities at AFOs, CAFOs, and dairies. The WSDA may seek a search warrant if denied access and may bring legal action to carry out the purposes of the chapter.

Procedures are described for notification of violations and for the issuance of directives or orders by the WSDA. Penalties consistent with the Clean Water Act are prescribed for those found guilty of violating the chapter.

Sections 37-45 - Amendments to Other Statutes

The DOE must develop and maintain a standard protocol for water quality monitoring of the waters of the state within the vicinity of dairies and CAFOs. The protocol must include sampling methods and procedures and identify the water quality constituents to be monitored. The initial protocol is to be submitted to appropriate legislative committees by December 1, 2005.

The authority of the Pollution Control Hearings Board is expanded to hear and decide appeals of decisions by the WSDA.

Section 18, establishing the Livestock Nutrient Management Advisory Committee, will take effect July 1, 2006, upon the expiration of an existing committee.

Amendments are made to various statutes updating definitions and references and repealing outdated sections.

Throughout the Bill

To execute the transfer of authority from the DOE to the WSDA, many references throughout the bill are changed from the DOE to the WSDA.

To execute the broadening of program applicability beyond dairies, many references throughout the bill are changed from "dairy" or "dairy farm" to "livestock," "AFO," or "CAFO."

Substitute Bill Compared to Original Bill:

After delegation of authority through the EPA, the WSDA's initial annual NPDES permit fee schedule will be the same as the existing DOE schedule, except that the fees may rise with the fiscal growth factor. Fees will be used for a specified list of costs incurred by the WSDA and will not involve full cost recovery. The DOE must develop and maintain a water quality

monitoring protocol for the waters of the state within the vicinity of dairies and CAFOs. The protocol must be submitted to the Legislature by December 1, 2005. The requirements for receiving a public disclosure exemption for confidential business information contained in a livestock nutrient management plan are not included in the substitute bill. Complaints against livestock producers must be in writing.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of session in which bill is passed, except for section 17, relating to establishment of a livestock nutrient management program advisory committee, which takes effect July 1, 2006.

Testimony For:

(In support of original bill) Transfer of the program to the WSDA from the DOE is important but there are several areas in the bill that need work: public disclosure/confidentiality of livestock nutrient management plans; the complaint process; permit fees; infrequency of inspections; and lack of water quality monitoring. Funding to support successful implementation of the legislation is requested for the conservation districts and the WSDA in the supplemental, capital, and operating budgets.

The bill completes the work of the 2003 Legislature by transferring program authority from the DOE to the WSDA. Most sections of the bill are not changes in current law. The bill is structured to meet the minimum federal requirements and is the first step in applying for delegated authority from the EPA. The initial permit fees are intended to be the same as the ones established by the DOE. Section 15 re-states but does not change current law, so removing it from the bill would not make an operational difference. Water quality monitoring by industry is most commonly handled one of two ways under the NPDES permit and either could be used to implement HB 1615.

(With concerns on original bill) Section 15 should be amended to prohibit disclosure of nutrient management plans in their entirety. Requiring a livestock producer to prove substantial, irreparable damage is an impossibly high standard. Disclosure of information in the Livestock Nutrient Management Plans will give competitors, suppliers, and buyers vital business information that should remain private. Disclosure of operational and logistical information may aid efforts by bioterrorists, animal rights terrorists, and ecoterrorists. Having the Director of Agriculture determine confidentiality case by case is too subjective.

Shellfish growers are concerned about the lack of regular inspections in animal feeding operations having fewer than 1,000 head. Shellfish growers are producers and understand the need for confidentiality, but if water quality is not good, then they can't harvest. An option to resolve the confidentiality impasse might be to allow the disclosure exemption but require random water quality monitoring as a performance-based accountability system.

Permit holders should not have to pay the entire cost. There is public benefit to the program and the public should bear some of the costs. Fees should stay consistent with the DOE's Dairy Nutrient Management Program. Complaints received by the WSDA about livestock operations should have to be in written form as in current law. Mortality handling needs to be addressed as introduced in the Senate.

Testimony Against: (Opposed to original bill) Livestock operations have been a significant source of water pollution in Puget Sound and several shellfish beds have been shut down. Environmental concerns with this bill include lack of access to the farm plans, agency accountability, and enforceability of the permit. Access and review of the farm plan is important because: (1) most requirements for the CAFO permit are contained in the farm plan; (2) farm plans are kept at each individual farm, but current public disclosure laws only allow access and review of documents that are state records; (3) under the Clean Water Act, if a producer is in compliance with the permit, he is shielded from all third party lawsuits, even if the operation is discharging above water quality standards.

It is a problem that there is no water quality monitoring required under this bill.

Resources at the WSDA for plan review and approval are minimal to nonexistent, and the bill calls for the WSDA to approve plans that meet just the minimum federal standards.

Persons Testifying: (In support of original bill) Mary Beth Lang, Washington Department of Agriculture; Melodie Selby, Washington Department of Ecology; and Debbie Becker, Washington Conservation Commission.

(With concerns on original bill) Chris Cheney, Washington State Dairy Federation and Washington Fryer Commission; David Secrist and Heather Hansen, Washington Cattle Feeders Association; John Stuhlmiller, Washington State Farm Bureau; Jack Field, Washington Cattlemen's Association; and Jim Jesernig, Washington Association of Conservation Districts and Pacific Coast Shellfish Growers Association.

(Opposed to original bill) Bruce Wishart, People for Puget Sound.

Persons Signed In To Testify But Not Testifying: None.